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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARION L. HAMPTON, Appellant.	2 CA-CR 2008-0196 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200600823

Honorable Janna L. Vanderpool, Judge

REVERSED AND REMANDED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Marion Hampton was convicted of three counts of aggravated assault and a single count of unlawful imprisonment. The trial court sentenced him to presumptive, consecutive prison terms of 7.5 years for each of the aggravated assault charges and a presumptive, concurrent term of one year for the unlawful imprisonment charge. On appeal, Hampton argues the court erred by denying his request to represent himself, improperly admitting evidence of other acts, and denying his motion to sever one of the counts. Because we agree the court erred in denying Hampton's request to represent himself, we reverse his convictions and remand for a new trial. We also address his argument relating to other acts evidence because it is likely to recur on remand.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). In 2005, Esther W. began visiting Hampton at his home and helping him with chores. Hampton was a friend of her former husband and had been ill. In January or February 2006, Esther was at Hampton's house when he told her not to touch a statue or coin, or he would cut her throat. Believing that he was joking, Esther touched the item. Hampton repeated "I'll cut your throat," and grabbed a knife and held it to her throat. When she put the item down, he removed the knife, and she fled from the house.

¶3 Some weeks later, Esther and Hampton returned to Hampton's house after having dinner at a local restaurant. As soon as Hampton unlocked the door, he grabbed her

by the neck and said, "You know, I can kill you just by strangling you. I don't have to kill you. I can just strangle you long enough to make you a vegetable the rest of your life." He threw her to the floor and strangled her until she passed out. When she regained consciousness, he said, "That was fun, wasn't it?" before strangling her until she passed out again. When she awoke again, she fled the house with Hampton taunting her, "Hurry up, you're worthless." When Esther got home, she told her boyfriend Albert C. what had happened. The next day, Albert went to Hampton's house to tell him that Esther would not be coming back to help him with household chores. Hampton then pointed a handgun at Albert, ordered him to sit down, and threatened to shoot him.

¶4 The following month, Leslie A., Hampton's long-term care case manager, made an appointment to visit his home. When she arrived, she sat down in a chair facing Hampton, and noticed there were six guns laid out on the coffee table between them. During their conversation, Hampton became increasingly irate, first complaining about the services he was receiving and then calling Leslie a "stupid, ignorant bitch" and a "bureaucratic whore." When he started talking about killing himself and killing her, she got up to leave and told him she would contact him and arrange to visit at a better time. He told her that she need not bother, and taking hold of one of the guns, told her he could shoot her now. She left the house, drove down the road, and called her supervisor to notify the supervisor what had occurred. The supervisor then called 911.

¶5 Hampton was subsequently charged with aggravated assault with a deadly weapon or dangerous instrument for the gun incidents involving Albert and Leslie, and aggravated assault with a deadly weapon or dangerous instrument—a knife—and kidnapping against Esther.[1] The jury found Hampton guilty of all three aggravated assault charges, dangerous nature offenses. It acquitted him of the kidnapping charge, but found him guilty of the lesser-included offense of unlawful imprisonment. He was sentenced as noted above, and this appeal followed.

Discussion

Self-representation

¶6 Hampton first argues the trial court committed reversible error in denying his request to represent himself. The right to counsel includes a criminal defendant's constitutional right to self-representation. *Faretta v. California*, 422 U.S. 806, 821 (1975); *see* U.S. Const. amend. VI. To exercise this right, "a defendant must voluntarily and knowingly waive his right to counsel and make an unequivocal and timely request to proceed

[1]The original indictment also included one count each of aggravated assault and kidnapping against a fourth victim, but these were severed before trial, apparently pursuant to an agreement between Hampton and the state.

pro se."[2] *State v. Lamar*, 205 Ariz. 431, ¶ 22, 72 P.3d 831, 835-36 (2003). A request is generally considered timely if made before the jury is empaneled. *Id.*

¶7 Hampton's request to represent himself was both unequivocal and timely.[3] At a hearing before the trial date was set, Hampton's appointed counsel stated Hampton had "informed [him] that he wishes to serve as his own counsel. This is his constitutional right." The court then asked Hampton the following: "You are requesting to act as your own

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[2]Although we review an untimely request for self-representation for an abuse of discretion, *State v. De Nistor*, 143 Ariz. 407, 413, 694 P.2d 237, 243 (1985), our supreme court has not yet determined what standard of review applies when the request was timely, *see State v. Djerf*, 191 Ariz. 583, n.2, 959 P.2d 1274, 1283 n.2 (1998). However, because our conclusion would be the same under either a de novo or a deferential standard of review, we do not reach this issue. *See id.*; *see also State v. Jackson*, 208 Ariz. 56, ¶ 12, 90 P.3d 793, 796 (App. 2004) ("A trial court abuses its discretion when it misapplies the law or predicates its decision on incorrect legal principles.").

[3]We are not persuaded by the state's argument, based on misleadingly selective quotations from the record, that Hampton "refus[ed] to relieve counsel of responsibility" and that this was "plainly irreconcilable with his self-representation request and cast justifiable doubt on the extent to which he wanted to represent himself." The court asked Hampton if he "want[ed] to relieve [counsel] of any responsibility in this case," and Hampton responded, "No. I'm not going to relieve him of responsibility. I want to address this after I prove my innocence." However, in response to the court's follow-up question, Hampton indicated he had misunderstood and did not want counsel to represent him at trial. Nor are we persuaded that Hampton abandoned his request to proceed in propria persona because "[i]n the 6 months that passed between the trial court's denial of [his] request and the trial . . . [he] not once restated his desire to represent himself." "Once a defendant has waived his right to counsel, that waiver continues until he 'clearly' indicates a change of mind." *State v. Rickman*, 148 Ariz. 499, 503, 715 P.2d 752, 756 (1986), *quoting State v. DeLuna*, 110 Ariz. 497, 502, 520 P.2d 1121, 1126 (1974); *see also United States v. Arlt*, 41 F.3d 516, 522-23 (9th Cir. 1994); *Brown v. Wainwright*, 665 F.2d 607, 612 (5th Cir. 1982) ("[a]fter a clear denial of [a] request [for self-representation], a defendant need not make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal").

counsel?" Hampton replied, "Yes, Your Honor," and explained he had been dissatisfied with the representation he had received from a series of appointed and retained lawyers. The court asked Hampton if he wanted his current counsel to represent him at trial, and he responded, "No, I would not want that." The court then said: "Well, you understand that he is not allowed to withdraw until you have new counsel?" to which Hampton responded, "Well, I want to be my own counsel."

¶8 Despite having previously found Hampton competent to stand trial, the trial court apparently believed it had a further duty to "make certain" Hampton was "able" to represent himself and that there were "certain procedures of law that [he] must be aware of" in order to do so. It therefore asked him if he had "any special training in legal issues, or any prior contact with the courts that would give [him] any ability to deal with the courts." Based on Hampton's response, and on the fact the case was proceeding to trial, the court stated it had "real concerns about [his] ability to understand the legal proceedings and be able to

adequately represent [him]self in a case of this nature, as serious as it is." It therefore denied his request to proceed without counsel.[4]

¶9 As noted above, although the trial court had concerns about Hampton's ability to represent himself, it had already determined he was competent to stand trial. And "[t]he test to be applied in determining whether one is legally capable of waiving counsel . . . is clearly [n]ot one of legal skills." *State v. Martin*, 102 Ariz. 142, 146, 426 P.2d 639, 643 (1967). Rather, if a defendant is competent to stand trial he is also competent to waive counsel. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). Thus, the "knowing and voluntary" requirement "is not a heightened standard of *competence*." *Id.* at 400-01. Instead, it requires that a defendant waiving counsel be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U.S. at 835, *quoting Adams v. United States*, 317 U.S. 269, 279 (1942).

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[4]During its dialogue with Hampton, the trial court arguably did not make Hampton "aware of the dangers and disadvantages of self-representation," *see Faretta*, 422 U.S. at 835, choosing instead to take the decision out of his hands. However,

> [i]f a defendant seeks to represent himself and the court fails to explain the consequences of such a decision to him, the government is not entitled to an affirmance of the conviction it subsequently obtains. To the contrary, the defendant is entitled to a reversal and an opportunity to make an informed and knowing choice.

Arlt, 41 F.3d at 521.

¶10 The trial court's denial of Hampton's constitutional right to self-representation was clearly erroneous. *See Martin*, 102 Ariz. at 146 n.3, 426 P.2d at 643 n.3 (noting that "precious little would remain of the constitutional right to defend oneself" if the exercise of such right was dependent on a defendant's legal skills). And such an error "is not amenable to 'harmless error' analysis." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); *see State v. Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d 915, 933 (2003) (characterizing denial of right to self-representation as structural error). We therefore reverse Hampton's convictions and sentence and remand the case for a new trial.

Other acts evidence

¶11 Hampton also argues the trial court erred in admitting evidence of other acts. We address this issue because it is likely to recur on remand.[5] *See State v. May*, 210 Ariz. 452, ¶ 1, 112 P.3d 39, 40 (App. 2005). "Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). Under Rule 404(b), Ariz. R. Evid., evidence of other acts

[5]Hampton also argues the trial court erred in denying his pretrial motion to sever one of the counts. Hampton waived this issue, absent fundamental error, by failing to renew the motion during trial in accordance with Rule 13.4(c), Ariz. R. Crim. P. *See State v. Flythe*, 219 Ariz. 117, ¶ 5, 193 P.3d 811, 813 (App. 2008). Indeed, he apparently agreed the four counts in this case would be tried together. But, because he may renew this motion before a retrial, we do not reach the merits of his argument. *See State v. McCrimmon*, 187 Ariz. 169, 174, 927 P.2d 1298, 1303 (1996).

may not be introduced "to show that a defendant is a bad person or has a propensity for committing crimes." *State v. Amarillas*, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984).

¶12 As a preliminary matter, Hampton fails to specify, with references to the record, the testimony he claims was admitted in error. He has thus arguably waived this issue. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's argument "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the . . . parts of the record relied on"); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal constitutes waiver of claim).

¶13 Even assuming Hampton has not waived this argument, his claims are without merit in any event. He first claims the trial court abused its discretion when it allowed Esther and Albert to testify about threatening statements he had made to them that were not related to the present offenses. Esther testified that "it [was] nothing for [Hampton] to say, 'I'll kill you,' or 'I'll kick your butt,' or call you out . . . to a fight. That is just a normal day for [Hampton]." And Albert testified that he had stopped being Hampton's friend after Hampton had "offered to kill my dog, kill my daughter, kill myself, burn my house down, kill my girlfriend's children, kill her, burn her house down." But when a statement is "not evidence

of [a defendant]'s conduct, but evidence of what he said," it is not an "act" as contemplated by Rule 404(b). *State v. Huerstel*, 206 Ariz. 93, ¶ 69, 75 P.3d 698, 713 (2003).[6]

¶14 Hampton also seems to argue the evidence that he had strangled Esther in March 2006 was improper other act evidence. However, this act was the means by which he held Esther against her will; it was thus intrinsic to the charge of kidnapping and not a "separate, extrinsic act to which Rule 404(b) applies." *See State v. Nordstrom*, 200 Ariz. 229, ¶ 56, 25 P.3d 717, 736 (2001) (evidence intrinsic when part of same criminal episode as crime charged). Hampton further contends he was prejudiced by "testimony that he would beat up on people . . . which was twice stricken." However, the trial court instructed the jury not to consider stricken testimony and thus mitigated any potential prejudice. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006) (presumption that jurors follow instructions). We thus find no reversible error.

Disposition

¶15 For the reasons stated above, we reverse Hampton's convictions and remand this matter for proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

[6]We do not address whether such statements would nonetheless constitute improper evidence of character "to prove conduct" pursuant to Rule 404(a), Ariz. R. Evid., because Hampton has not challenged those statements on that basis.

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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ANN A. SCOTT TIMMER, Judge*

*The Honorable Ann A. Scott Timmer, Chief Judge of Division One of the Arizona Court of Appeals, is authorized to participate in this appeal pursuant to A.R.S. § 12-120(F) (2003).